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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 24

IN THE MATTER OF FLORIDA EAST COAST RAILWAY CO.,
Debtor,

ST. JOE PAPER CO., a corporation, and JESSIE BALL duPONT, ELBERT DENT, EDWARD BALL and THE FLORIDA NATIONAL BANK OF JACKSONVILLE, as Testamentary Trustees of the Trust Estate created by the Last Will and Testament of Alfred I. duPont, RAILWAY LABOR EXECUTIVES ASSOCIATION, SEABOARD AIR LINE RAILROAD COMPANY, SOUTHERN RAILWAY SYSTEM and F. K. CONN,
Petitioners,

vs.

ATLANTIC COAST LINE RAILROAD CO.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION OF THE RESPONDENT, ATLANTIC COAST LINE RAILROAD COMPANY, FOR A REHEARING

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ST. JOE PAPER CO., a corporation, and JESSIE BALL DUPONT, ELBERT DENT, EDWARD BALL and THE FLORIDA NATIONAL BANK OF JACKSONVILLE, as Testamentary Trustees of the Trust Estate created by the Last Will and Testament of Alfred I. duPont, RAILWAY LABOR EXECUTIVES ASSOCIATION, SEABOARD AIR LINE RAILROAD COMPANY, SOUTHERN RAILWAY SYSTEM and F. K. CONN,
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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION OF THE RESPONDENT, ATLANTIC COAST LINE RAILROAD COMPANY, FOR A REHEARING

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

PETITION.

The respondent, Atlantic Coast Line Railroad Company, petitions the Court for a rehearing herein.

PRELIMINARY STATEMENT.

The grounds on which the rehearing is sought are set forth below.

The gist of the Court's opinion is that the Commission had no authority to approve the Plan in the absence of

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affirmative action by Florida East Coast Railway Company, the Debtor, or by the owner or owners of its stock. *The issue as to the validity of the Plan which was litigated before the Interstate Commerce Commission and the lower courts related to the effect of the opposition of bondholders; for years there had been no issue about the effect of the absence of affirmative action by Florida East Coast Railway Company or the owner or owners of its stock.* We show this in detail at pages 8-14 below.

Under the circumstances, it is fitting to call the Court's particular attention to certain facts with respect to the Debtor and the ownership of its stock, to which facts the Court's attention had not been called when it decided the case, and also to indicate, in general, the factual and legal showing we would expect to make if there should be a remand for further proceedings in accordance with this Court's opinion of April 5, 1954.

As appears below, all of the stock of Florida East Coast Railway Company (except directors' qualifying shares) is owned by a single stockholder, the Trust under the will of Mary Flagler Bingham, widow of Henry M. Flagler, the founder of the Company.

If there were a remand to the District Court for further proceedings in accordance with this Court's opinion, we would expect to make the following showing:

The President of the Railway Company is the sole Trustee of the Bingham Trust.

The acts of the Railway Company and of the Bingham Trust over the period from September, 1944 (prior to the introduction of the Lynch plan, which is referred to at page 2 of this Court's opinion) until the present time (including acts subsequent to this Court's opinion of April 5, 1954) have been such as to call for an approval of the Plan by the District Court on a remand to that Court for further proceedings in accordance with this Court's opinion.

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The showing would cover (1) some acts which are disclosed by the record now before this Court,* (2) other actions prior to April 5, 1954, which are not disclosed by the record before this Court and (3) steps taken since April 5, 1954. We do not make a further specification of the showing because to do so it would be necessary to go outside of the record. We stand ready, of course, to give particulars if they be desired by the Court.

Should the question arise as to why the record before this Court is not complete as to everything which was done by the Railway Company or the Bingham Trust during the period covered by the record, the answer is that, as we show below, it was never understood to be significant what the Railway Company or the Trust did or omitted to do, since the stock had been determined to be, and was universally agreed to be, wholly without value.

The question may also arise why, if we expect to be able to show that under the decision of April 5, 1954 the District Court should approve the Plan, we nevertheless ask for a rehearing.

The first reason is that we believe that the decision of the Court of Appeals was correct and should have been affirmed. The second reason is that past experience in this case leaves no doubt that a showing in the District Court that the Plan should be approved would be vigorously contested by the opponents of the Plan and that at the least there would be further litigation and delay in a case which has already been in the Courts for 23 years and which has been before the Court of Appeals twice.

* Such acts commenced in 1944 with discussions between the Atlantic Coast Line and the Bingham Trust which resulted in the granting to the Atlantic Coast Line of a verbal option on the stock at a price to be agreed upon. The Atlantic Coast Line desired the option at that time because new reorganization legislation was thought likely but in 1948 the option was still in effect. Counsel for the St. Joe Paper Company brought out these facts by taking the deposition of the President of the Atlantic Coast Line in 1948 and addressing interrogatories to the Atlantic Coast Line. See Volume IV of the record, pages 149-150, 162-164. The record does not contain anything about the option since then.

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In asking the Court for a rehearing we do not have in mind only the effect of this Court's opinion on this case. As we show later, the opinion contains far-reaching statements about

(1) the functions of debtors in railroad reorganizations under § 77 of the Bankruptcy Act;

(2) the functions of the Commission generally in connection with unifications under § 5 of the Interstate Commerce Act; and

(3) the unification of parents and subsidiaries under § 77 of the Bankruptcy Act and § 5 of the Interstate Commerce Act.

It is our earnest conviction that the statements on these subjects conflict seriously with previous decisions of this Court and in some respects with the express provisions of § 77 of the Bankruptcy Act and § 5 of the Interstate Commerce Act and that what the Court has said will seriously interfere with the administration of proceedings under those two Sections. Some of the most important statements go into areas which had not been explored in any of the briefs or on the argument.

Finally, we call particular attention to what is said at pages 27-32 below about the use in this Court's opinion of Senate Report No. 1170, which was issued in 1946. The dissenting opinion states what we would have thought to be unanswerable objections to the use of that Report, but the dissenting Justices had no reason to know of some of the gravest of the many objections to the use of the Report. The reason why they did not know more about the Report is because it was not referred to in any of the briefs or on the argument; and it is natural that the Report should not have been referred to in the briefs or on the argument because this Court had held specifically in a prior case that the Report should not be considered in construing § 77.

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GROUNDS FOR THE REQUESTED REHEARING.

What the Court held.

The "forced merger", which this Court has condemned as illegal, is defined in footnote 2 as follows:

> "By 'forced merger' plan, or 'compulsory merger' plan, is meant a merger plan foisted upon one of the parties by the Commission, as distinguished from a merger voluntarily initiated by the participating carriers."

There are several crucially important words in this definition.

"Merger"

As we point out later, *the plan in this case provided for* (1) *a transfer of the assets of the Florida East Coast Railway Company to Atlantic Coast Line Railroad Company* or (2) a merger of the two corporations or (3) a consolidation of the two corporations.[1] *It is not necessary*

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[1] See below at pages 19-21.

The term "transfer of assets" denotes a conveyance of the realty and a transfer of all personal property; a transfer of all of the assets does not affect the transferor *as a corporate entity.* A statutory "merger" is an absorption of one corporate entity, which ceases to exist, by another with a resulting single entity. A statutory "consolidation" is a union of two corporate entities by which both survive as a single entity.

The term "unification" has been frequently used and seems apt to cover a transaction which will result in bringing together the assets of two corporations by any one of the three methods: (1) a transfer of assets, (2) a merger or (3) a consolidation. Cf. Swaine, *Reorganization of Corporations* (1928) 28 Col. L. Rev. 29, 32-35 et seq. See also the respondent's brief in opposition to the petition for certiorari in No. 670 at pages 25-26.

In the 1920s the word "consolidation" was generally used with reference to any type of unification. In this proceeding the word "merger" has been quite generally used with reference to the unification provided for by the Commission's Plan, although, as appears later herein, Atlantic Coast Line has frequently pointed out that a corporate merger would not necessarily be involved.

that it be carried out by a corporate "merger" or "consolidation". In order to avoid any possible misunderstanding, we will refer to the plan in this petition, as we have on many occasions during the proceeding, as providing for a "unification", using that term to denote (1) *a transfer of assets,* (2) *a merger or* (3) *a consolidation.*

Who is to act for the "carrier"?

The definition in footnote 2 refers to the "participating carriers". The Court frequently speaks elsewhere in the opinion of the "carriers".

Who is to speak for the Florida East Coast Railway Company? The opponents of the Plan argued that only the bondholders, whom they called the "equitable owners", could speak for the Railway Company.

However, the next to the last sentence of footnote 12 says that only "those who in the absence of § 77 would wield the corporate merger powers" can speak for the Debtor now. The dissenting opinion says:[2]

> "The trustees take over the functions of the officers and board of directors. But apparently the Court, when it refers to 'the debtor,' does not mean the trustees, for it speaks of 'those who in the absence of § 77 would wield the corporate merger powers.' That must mean either the old management or the stockholders."

In this case, as we note later, there is only a single stockholder, the Trust under the will of Mary Flagler Bingham. Florida East Coast Railway Company is simply the Bingham Trust in corporate form. What this Court has said is that Florida East Coast Railway Company or the Bingham Trust must take some affirmative action if there is to be a valid plan.

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[2] Page 8.

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"Initiate"; "consent":

The minority of the Court evidently understood that the Court held only that there must be a "consent" of the Debtor.[3] Much in the Court's opinion suggests that it had only "consent" in mind: the use of the words "force", "forced", "compel", "compelled" and "compulsory", as well as the words "foisted upon"[4] and "railroaded",[5] does not seem to be fitting in connection with a transaction which is consented to.

The opinion also uses the words "initiated", "initiate", "initiative", "originates", "put forth" and "work out". If the Court intended to require more than a consent, it did not say what is necessary.

Summary of the first holding:

Whatever room there may be for differences as to the correct interpretation of the opinion, it seems clearly to hold that the Plan in this case is unauthorized in the absence of affirmative action by Florida East Coast Railway Company, the Debtor, or by the sole stockholder, the Bingham Trust.

Nowhere does the opinion suggest that the opposition of any bondholders affected the validity of the *approval* of the Plan.

The second holding:

In this case the single stockholder did not object, nor did the Railway Company. However, the absence of any objection by the Railway Company and its stockholder was treated as immaterial in another holding, at pages 15-16:

> "And so, if a plan does not satisfy the basic conditions which circumscribe the Commission's power, it has a congenital defect, and any interested party can object to its attempted effectuation."

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[3] See the dissenting opinion at page 8.

[4] Footnote 2.

[5] Page 11.

The proposition adopted in the Court's opinion, that the Plan could not be approved in the absence of affirmative action by the Debtor (the stockholder), was not the basis of any objection to the Plan approved by the Commission, either before the Commission or before the District Court.

That proposition was not urged by any petitioner before this Court, or before the Court of Appeals on either of the appeals to that Court.

The proposition is radically different from any opinion ever expressed by any Judge in the lower Courts or by any Interstate Commerce Commissioner.

The term "forced merger" has been generally used in this case, until this Court's opinion, to denote a plan under which the Debtor's assets would be transferred to the Atlantic Coast Line and which was *opposed by a majority in amount of the bondholders.* Whatever the ambiguities in the use of the term, the opposition of bondholders has been the factor relied upon.[6]

In this Court's opinion the term "forced merger" is used to denote a plan with respect to which *affirmative action was not taken by the Debtor or the Debtor's stockholder.*

It is hard to conceive of two things more different than (1) the affirmative opposition of bondholders and (2) the absence of affirmative action by the Debtor or by the Debtor's stockholders.

When Judge SIBLEY ruled in 1949 that there was an unlawful "forced merger", he was referring to the objections of bondholders, since he said: "It is expressly found that the debtor's insolvency is such that the stockholders are not interested parties".[7]

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[6] See the discussion in the respondent's brief in No. 24 (p. 49-54).

[7] V. 476; 81 F. Supp. 932. A pertinent portion of Judge Sibley's holding was quoted in the brief on behalf of St. Joe Paper Company, et al., in No. 24 at pages 20-21.

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Before Judge SIBLEY it was argued that the Commission had no power to approve the Plan because the Atlantic Coast Line had no standing to present a plan. Judge SIBLEY said:[8]

> "Turning next to some vital questions of law which have been pressed, I do not think it matters whether the Coast Line as an unsecured creditor (which class, along with the stockholders, has been found to have no interest) had a right to present a plan. The Commission took note of it, modified it substantially and adopted it. *The Commission had the right to propose a plan not presented by any party in interest. This plan comes to the court as the plan or proposal of the Commission.*"[9]

On the appeal from Judge SIBLEY's decision counsel for the Southern Railway System and the Seaboard Air Line Railroad Company, who made the principal argument on the "forced merger" point, defined a "forced merger" as one "opposed by a majority in amount of the debtor's bondholders who would be entitled to the stock of the new company in an independent reorganization".[10]

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[8] V, 475; 81 F. Supp. 932.

[9] Italics are supplied in quotations in this petition unless otherwise indicated.

[10] In their brief of August 27, 1949, after saying that counsel for the Atlantic Coast Line had incorrectly stated their contention, counsel for the Southern Railway System and Seaboard Air Line Railway Company said (p. 53-54):

> "Correctly stated, their contention is that a unification is a forced or involuntarily consolidation, and hence beyond the power of the Commission to compel, where the stock of the debtor has been found to be without value, and the merger is opposed by a majority in amount of the class or classes of the debtor's bonds which are entitled to the equity in its property. Stated another way, a merger is involuntary when it is opposed by a majority in amount of the debtor's bondholders who would be entitled to the stock of the new company in an independent reorganization."

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In the Court of Appeals Chief Judge HUTCHESON said, referring to Judge SIBLEY's opinion (179 F. 2d 538, 543):

> "With the first reason, as broadly put by the trial judge, that, because the plan provided, *over the objection of the bondholders,* for merging the debtor with Coast Line, without having the properties put up for sale, it would not be lawful under the statute, we cannot agree."

Judge HUTCHESON and Judge HOLMES constituted the majority of the Court on the "forced merger" point. Judge HOLMES said that the Debtor's "insolvency is such that the stockholders are not interested parties" and that the "refunding bondholders are the parties primarily interested" (p. 546).

The record establishes that on the remand to the Commission there was a uniform understanding that the "forced merger" point involved the opposition of bondholders, not action by stockholders or the Debtor which was controlled by the single stockholder; the brief which Southern Railway System filed with the Commission on October 9, 1950 said:[11]

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[11] At page 11 of the Southern's brief.

Counsel for the Southern Railway System did not reargue the point, which was regarded as established until reviewed by this Court, but the Southern Railway System preserved its rights by making the objection quoted at page 11 of this petition.

Seaboard Air Line Railroad Company's brief of October 9, 1950 requested the Commission to find (p. 2):

> "1. That the Commission is without statutory power to approve a plan of reorganization of the debtor, such as the Coast Line's Plan, that would result in the merger or consolidation of the debtor's property with Coast Line, *without the consent and over the objections of the holders of a large majority in amount of the debtor's First and Refunding Mortgage bonds,* who are the equitable owners of the debtor's property."

We have not found in any of the briefs which were filed with the Commission in October 1950 by the opponents of the Plan any

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> "Southern has earnestly insisted before the Commission and the courts that the Commission is wholly without statutory power to approve a plan of reorganization which would result in a merger or consolidation of the debtor with another carrier, *without the consent and over the objections of the holders of an overwhelming majority of the First and Refunding Mortgage bonds of the debtor, who are now the equitable owners of the debtor's property.*"

The Commission approved the Plan on July 12, 1951, in a Report in which it accurately stated the holdings of Judge SIBLEY and of the majority of the Court of Appeals.[12]

The parties had 60 days to file petitions for modifications under subsection (d). The opponents of the Plan all filed petitions and again those who raised the "forced merger" point spoke of the opposition of the bondholders.[13]

Before the District Court there was only one objection to the Plan which raised the "forced merger" point. That objection and the brief in support thereof made it clear that the objector, Southern Railway System, was relying

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suggestion that action by the Debtor corporation or its stockholder was required.

The briefs filed with the Commission are included in the unprinted record before this Court.

[12] 281 I. C. C. 81, at 81-82, in Vol. I of the Record.

[13] The Southern Railway System was not specific, but suggested no change from the position it had taken in its brief of October 9, 1950. See footnote 11 above.

The Seaboard Air Line Railroad Company simply referred (p. 3) to the brief in the Court of Appeals which is referred to in footnote 10 above.

The Trustees of the First and Refunding Mortgage objected (p. 3)

> "That the Commission has no power to force a merger of the debtor with the Coast Line over the objections herein recorded by the holders of the First and Refunding 5% Bonds; * * *."

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upon the opposition of the bondholders.[14] Precisely the same thing was true before the Court of Appeals.[15]

In the Court of Appeals Chief Judge HUTCHESON quoted from his opinion on the previous appeal and Judge RUSSELL said for the minority:[16]

> "The bald proposition established by the majority opinion is that the court's power in bankruptcy authorizes the taking, against the wishes of the overwhelming majority of the refunding bondholders, of their existing rights, requiring acceptance by them of an entirely different and unrelated security which they do not desire."

In this Court also the "forced merger" point was understood to relate to the opposition of bondholders, not the absence of affirmative action by the stockholder or by the Debtor, which is controlled by the stockholder.[17]

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[14] The objector did refer to "the consent of the debtor or of the equitable owners of the properties" and also "to the consent of each separate carrier" (I, 100) but in the brief which it filed in the District Court it stated its proposition in the headnote reading as follows (p. 6):

> "The Commission was without statutory authority to approve a plan of reorganization of debtor requiring debtor's properties to be merged with Coast Line without the consent, and over the objections, of the overwhelming majority of the equitable owners of debtor."

The term "equitable owners" was used to denote the bondholders, not the stockholders.

[15] Southern Railway Company's principal contention was stated (p. 2) under a headnote identical with that which we have just quoted in footnote 14.

[16] 201 F. 2d 325, 329, 331.

[17] It is true that the petition for certiorari herein spoke of "the request of the carriers", "the consent of the carriers", etc. (e.g. p. 18). But it also spoke of "the equitable owners of the Florida East Coast", the term used by the opponents of the Plan to describe the bondholders (p. 26). Counsel for respondent, Atlantic Coast Line Railroad Company, were justified in assuming that the petitioners sought to raise the same issue which had been passed on by the Commission and the lower Courts (see brief of respondent, Atlantic Coast Line Railroad Company, in opposition to petition for certiorari, dated April 6, 1953, p. 4-7).

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Counsel who argued for the petitioners said in his brief in No. 24 (p. 20):

> "The Commission has found that the stock is worthless and the stockholders no longer have any interest in the property, and the 5% bondholders are the equitable owners of the property. * * * To say the least, it is inadmissible that the stockholders would be heard either to consent or to object to a merger, or to represent the corporation, on that subject."[18]

Furthermore, on the oral argument counsel for the petitioners said:

> "Well, I stand flat on the proposition that nobody who has no interest in this road has any right to speak for it. Now, the Commission said that the stockholders had not objected. I say that is frivolous. The stockholders haven't a penny of interest in the road and they haven't showed up in the litigation. They have found the stocks are worthless, and the road just belongs to these bondholders. The Commission has said so. And I just cannot agree to any sort of idea that anybody short of the people who really own the property have got a right to speak up and consent to a merger."

Footnote 4 of this Court's opinion reads as follows:

> "'The Circuit Judges of the Fifth Circuit who have at some stage in these proceedings passed on

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[18] It is true that in the preceding paragraph of the brief it was said (p. 20):

> "The correct point of view is that the Commission could only order a merger if and when the carriers initiate it and consent thereto."

However, counsel then went on to make it clear that when he spoke of "the carriers" he meant "the 5% bondholders" in the case of the Debtor and that he did not mean the stockholders. He expressly and categorically rejected the idea that those "who in the absence of § 77 would wield the corporate merger powers" have the same powers in § 77 if the Commission "has found that the stock is worthless".

this question of the Commission's power have thus divided evenly on *the issue.* Judges HUTCHESON, HOLMES and RIVES concluded that the Commission had *such power;* Judges SIBLEY, BORAH, and RUSSELL concluded that it did not."

It is *not* correct that the Circuit Judges of the Fifth Circuit have divided on any issue whether it is necessary to have a plan consented to by "those who in the absence of § 77 would wield the corporate merger powers". They divided on a completely different issue: whether the Commission had the power to approve the Plan over the objection of the holders of a majority in amount of the bonds.

The Debtor and its stockholder.

All of the stock of the Florida East Coast Railway Company (except seven directors' qualifying shares) is owned by the Trust under the Will of Mary Flagler Bingham, the widow of Henry M. Flagler, the founder of the Company. The stockholder has continued the corporate existence of the Company by electing directors annually and by having the directors also serve as officers. At the end of 1952 there were four directors, also serving as officers, of whom three were in New York and one in Jacksonville.[19]

All of the Railway Company's assets have been in the hands of the District Court in Jacksonville since 1931.

The Interstate Commerce Commission has held on seven occasions that the stock is without value, the first time in 1942.[20]

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[19] These data are taken from the same Annual Reports of Florida East Coast Railway Company, Form A, which are referred to in footnote 12 to the Court's opinion.

[20] 252 I. C. C. p. 465 (Report, April 6, 1942)
252 I. C. C. p. 757 (Supplemental Report, August 10, 1942)
261 I. C. C. p. 172 (Second Supplemental Report, January 8, 1945)
267 I. C. C. p. 383 (Third Supplemental Report, April 8, 1947)

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No objection has ever been made to any of these seven findings.

The Florida East Coast Railway Company's liabilities exceed any reasonable valuation of its assets by upwards of $30,000,000 and that has been the situation for many years.[21]

At least since 1941, when the § 77 proceeding was instituted, the District Court has had "exclusive jurisdiction of the debtor and its property wherever located"[22] and the Trustees of the Debtor's property (now a single Trustee) have had title to the Debtor's property.[23]

The Debtor has appeared formally by counsel on many occasions in the District Court and before the Commission, but has never stated any position on the record.

While the Court's opinion may have been supposed to have only a narrow scope and limited effect, the comments therein on several subjects can have far-reaching consequences and gravely interfere with the execution of the intent of Congress as expressed in § 77 of the Bankruptcy Act and § 5 of the Interstate Commerce Act.

Although there are various statements in the Court's opinion which might be construed to limit its scope and

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267 I. C. C. p. 756 (Fourth Supplemental Report, March 25, 1948)

282 I. C. C. p. 185 (Fifth Supplemental Report, July 12, 1951)

282 I. C. C. p. 224 (Sixth Supplemental Report, October 25, 1951)

[21] The claims of the creditors to be treated under a plan, including principal of and interest on the First and Refunding Mortgage Bonds and approximately $2,500,000 of unsecured claims, total in excess of $80,000,000 (see the respondent's brief of April 6, 1953 on page 17). All of the findings of the value of the assets which would be available towards the satisfaction of those claims (or the securities which could be issued for them) are well under $50,000,000 (see, for example, 282 I. C. C. p. 157-158, 162-163).

[22] § 77(a).

[23] § 77(c)(2); § 70(a).

effect, the opinion contains far-reaching and significant statements about

(1) the functions of debtors in railroad reorganizations under § 77;[24]

(2) the functions of the Commission generally in connection with unifications under § 5 of the Interstate Commerce Act;[25] and

(3) the unification of parents and subsidiaries under § 5 of the Interstate Commerce Act.[26]

We set forth briefly below the bases for our conviction that the statements will seriously interfere with the administration of § 77 of the Bankruptcy Act and § 5 of the Interstate Commerce Act and that the intent of the Congress, as expressed in those Sections may be thwarted.

As we show below, *in making two of the three statements the Court entered areas which had not been explored in any of the briefs or on the argument.*

The broad statements about the functions of debtors in railroad reorganizations.

In this Court's comprehensive opinion in *Ecker* v. *Western Pacific Railroad Corp.* (1943) 318 U. S. 448 it was said (p. 468):

> "[Congress] established standards for administration and placed in the hands of the Commission the primary responsibility for the development of a suitable plan. When examined to learn the purpose of its enactment, § 77 manifests the intention of Congress to place reorganization under the leadership of the Commission, subject to a degree of participation by the court."

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[24] In the second paragraph of footnote 12.

[25] Pages 7-8.

[26] In the second sentence of the first paragraph of footnote 12.

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Since the *Western Pacific* opinion the general understanding has been that the leadership and primary responsibility for a plan rest on the Commission, not on a debtor, although debtors and stockholders have sometimes continued efforts to obtain dominant positions in reorganization proceedings.

Where the stock of debtors has been found to be of no value stockholders are expressly excluded by § 77(e) from voting on plans and in many such cases neither the debtors nor the stockholders have been able to vote on or to veto plans or dominate reorganization proceedings.[27]

However, this Court has now said in the second paragraph of footnote 12:

> "In this connection it is important to remember that a railroad in § 77 proceedings is not a defunct organism but remains a live and going concern. See the references throughout § 77 to 'the debtor' as an

[27] The following decisions of this Court involved three reorganizations in which the stockholders were excluded from participation: *Ecker* v. *Western Pacific Railroad Corp.* (1943) 318 U. S. 448; *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.* (1943) 318 U. S. 523; *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western R. Co.* (1946) 328 U. S. 495; *Insurance Group Committee* v. *Denver & Rio Grande Western Railroad Co.* (1947) 329 U. S. 607.

In the following four cases Circuit Courts of Appeals affirmed orders under which stockholders were excluded from participation: *Brooks* v. *St. Louis-San Francisco Railway Company* (C. C. A. 8th, 1946) 153 F. (2d) 312, cert. den. *Brooks, Administrator* v. *St. Louis-San Francisco Railway Co.* (1946) 328 U. S. 867, rehearing denied (1946) 329 U. S. 820; *Chicago, Rock Island & Pacific Railway Company* v. *Fleming* (C. C. A. 7th, 1946), 157 F. (2d) 241, cert. den. *Chicago, Rock Island & Pacific Railway Co.* v. *Fleming* (1946) 329 U. S. 780, *Harrison* v. *Fleming* (1946) 329 U. S. 780, *Axelrod* v. *Fleming* (1946) 329 U. S. 811; *Old Colony Bondholders* v. *New York, New Haven & Hartford Railroad Co.* (C. C. A. 2nd, 1947) 161 F. (2d) 413, cert. den. *Protective Committee for Bonds of Old Colony Railroad Co.* v. *New York, New Haven & Hartford Railroad Co.* (1947) 331 U. S. 858, rehearing denied (1947) 332 U. S. 803; *State of Texas* v. *Group of Institutional Investors* (C. C. A. 8th, 1951) 191 F. 2d 265, cert. den. (1952) 342 U. S. 904, 918.

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active entity; also *Van Schaick* v. *McCarthy*, 116 F. 2d 987, 992-993. During the entire period that the Florida East Coast has been in receivership or § 77 there have been annual stockholders' meetings at which a Board of Directors was elected. See the Florida East Coast's Annual Reports on file with the Interstate Commerce Commission. Indeed the desire to provide a ready remedy for the overhauling of a railroad's financial structure without impairing its primary responsibilities as a regularly functioning carrier was one of the principal reasons for the enactment of § 77. See 5 Collier, Bankruptcy, § 77.02. Thus it follows from the consistency clause, when viewed in the light of this corporate continuity of a railroad in reorganization, that those who in the absence of § 77 would wield the corporate merger powers must initiate and work out the merger now. Cf. § 77(d), which not only permits but requires the debtor railroad itself to file a plan of reorganization."

The Court has indicated an opinion as to the powers, duties and rights of a debtor in a § 77 proceeding, and particularly the relationship of the debtor to a plan of reorganization, which does not harmonize with § 77 as previously interpreted by this Court, and we have no doubt that footnote 12, if permitted to stand, will gravely impair the general usefulness of § 77. Indeed, the publication of the opinion in this case precipitated a public argument between the Chairman of the Board of Directors of the Missouri Pacific Railroad Company and the Trustee appointed by the Court (see Appendix B hereto).

The implications of the paragraph are that the debtor is supposed to remain "a live and going concern" throughout the reorganization; that the debtor has a duty to file a plan of reorganization; and that one of the principal purposes of § 77 was to "provide a ready remedy for the overhauling of a railroad's financial structure without impairing its primary responsibilities as a regularly func-

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tioning carrier". The principal authority cited is in *Van Schaick* v. *McCarthy* (C. C. A. 10, 1941) 116 F. 2d 987, 992-993, which says that "Sec. 77 has for its main purpose the rehabilitation of the debtor by a readjustment of its financial structure in the interest of the debtor and its creditors and security holders * * *." *Van Schaick* v. *McCarthy* did not involve a plan of reorganization at all and the comments at pages 992-993, cited in this Court's opinion, are of the most general character. *Collier, Bankruptcy* merely quotes from *Van Schaick* v. *McCarthy*.

It is anomalous to speak of a § 77 proceeding as if its purpose was to rehabilitate *the debtor corporation* when the statute expressly provides that the debtor corporation may be stripped of everything that it has and allowed to die. The purpose of the statute is manifestly not to rehabilitate the debtor corporation but rather to assure the satisfactory maintenance of carrier services and to treat the security holders fairly and equitably.

In view of what is said on this subject in the dissenting opinion, further comment in this petition would be superfluous except to say that there is a close relationship between the second paragraph of footnote 12 and Senate Report 1170 of the 79th Congress, 2nd Session, which is referred to later.

The Court apparently overlooked the fact that the Plan specifically authorizes a transfer of the assets of the Debtor, as distinguished from a merger or consolidation.

The Plan provides for (1) a transfer of the assets of Florida East Coast Railway Company to Atlantic Coast Line Railroad Company or (2) a merger of the two corporations or (3) a consolidation of the two corporations.[28]

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[28] 282 I. C. C. 213.

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On the argument, as a result of a question from the bench, counsel for the respondent read the entire section of the Plan which is entitled "Transfer of the Debtor's Properties to Atlantic Coast Line Railroad Company".

A transfer, a merger and a consolidation are the three kinds of unification authorized by § 77(b)(5).[29]

The pertinent part of § 77(b)(5) was quoted in the respondent's brief in No. 24:[30]

> "(b) A plan of reorganization within the meaning of this section * * * (5) shall provide adequate means for the execution of the plan, which may include *the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations* * * *."

Moreover reference was made in the brief to the fact that the Plan authorized a transfer of assets[31] and in Point III in the brief it was said:[32]

> "It is unnecessary to consider whether complications would arise if an effort were made to carry out the Plan in this case by a technical merger or consolidation rather than by transfer of the Debtor's assets, because the Plan expressly authorizes a transfer and conveyance of the assets by the Debtor's Trustees (282 I. C. C. 213)."

However, *the quotation from § 77(b)(5) in this Court's opinion omits the words "the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations."*[33] The opinion

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[29] See footnote 1 at page 5.

[30] Pages 13, 48a, 56.

[31] Pages 2, 25, 54, 62, 71-72, 74-75.

[32] Page 75.

[33] Page 5, note 5.

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reads as if under the Plan there had to be a merger or consolidation and there could not be a simple transfer of the assets of the Debtor to the Atlantic Coast Line.

This misconception may have affected the Court's decision, since the technical steps required to effect a corporate merger or consolidation are different from those required to effect a transfer of assets—particularly a transfer of assets which are vested in Trustees—and there are differences with respect to the procedure under Section 5 of the Interstate Commerce Act.

If the issue briefed and argued before this Court had related to the necessity of action by the stockholder or the debtor (the incorporated stockholder), it would have been logical to stress that, in order for there to be a transfer of the assets of an insolvent corporation, it is not necessary under either § 77 of the Bankruptcy Act or § 5 of the Interstate Commerce Act for the stockholders (or the debtor) to do anything. However, the issue briefed and argued before this Court pertained to the *opposition of bondholders,* and if the arguments based on the opposition of bondholders had been sound, it would not have made any difference whether the unification was to be accomplished by a transfer of assets, by a merger or by a consolidation.

The conflicts between statements in the Court's opinion about Section 5 of the Interstate Commerce Act and the explicit provisions of the statute.

The opinion's treatment of Section 5 questions which were not argued before this Court.

The confusion on these matters which the opinion creates.

The Court's opinion says:[34]

"Suffice it to say here that one clear thread which runs through a course of legislation extending over

[34] Page 7.

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> a period of twenty years, as well as through the various commentaries upon it, is that only mergers voluntarily initiated by the participating carriers are encompassed by that statute and sanctioned by it. From the initial enactment in the Transportation Act of 1920, 41 Stat. 480, to the most recent comprehensive re-examination of these provisions in the Transportation Act of 1940, 54 Stat. 905, Congress has consistently and insistently denied the Interstate Commerce Commission the power to take the initiative in getting one railroad to turn over its properties to another railroad in return for assorted securities of the latter. The rôle of the Commission in this regard has traditionally been confined to approving or disapproving mergers proposed by the railroads to be merged."

This portion of the opinion raises two questions: (1) whether in the case of a unification it is necessary for all "participating carriers" to file applications under § 5 of the Interstate Commerce Act and (2) whether the Commission's function is "confined to approving or disapproving" unifications which have been proposed by the railroads.

(1)

If a unification takes the form of a corporate merger or a corporate consolidation, § 5 does appear to contemplate the filing of applications by all participating carriers. In this respect § 5 is consistent with state laws which contemplate action by the stockholders of all participating corporations.

However, with respect to a transfer of the assets of one carrier to another the pertinent provisions of Section 5(2) read as follows:[35]

> "(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

[35] A fuller quotation from Section 5(2) will be found in the brief of St. Joe Paper Company and others in No. 24 at pages 5-6.

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> (i) * * * for any carrier * * * to purchase, lease, or contract to operate the properties, or any part thereof, of another; * * *.
>
> (b) Whenever a transaction is proposed under subparagraph (a), the carrier * * * seeking authority therefor shall present an application to the Commission * * *."

In view of the clear provisions of the statute it has been considered to be settled that *in the case of a transfer of assets authority should be sought under Section 5(2)(b) by the carrier which is purchasing the assets but that it is neither necessary nor proper for the transferor to apply.*[36]

The Commission considered the Plan as involving a transfer of the properties of the Debtor to Atlantic Coast Line Railroad Company. It did not consider it necessary to have any application or other action on the part of Florida East Coast Railway Company, but it did consider it necessary to have the record "contain any information required in a proceeding under Section 5(2) of the Interstate Commerce Act".[37]

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[36] See Appendix A.

[37] In the Commission's Third Supplemental Report it said, with respect to a plan which Atlantic Coast Line had proposed (267 I. C. C. p. 308):

> "The Coast Line plan, by which control would be transferred to that carrier, is in effect a request or application to us by one carrier for authority to acquire control of another and, in conformity with the provisions of subsection (f) of section 77 of the Bankruptcy Act that the transfer of the properties of a debtor be not inconsistent with the provisions and purposes of the Interstate Commerce Act, the record should contain the information required in a proceeding under section 5 (2) of the Interstate Commerce Act."

Manifestly it treated the Plan ultimately approved as falling in the same category.

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In the § 77 reorganization of Alton Railroad Company, through which the assets of the Alton were transferred to the Gulf, Mobile & Ohio, the procedure followed was exactly that contemplated by the parties and the Commission in this case: the only application under the Interstate Commerce Act was that the acquiring carrier, Gulf, Mobile & Ohio Railroad Company.[37a]

(2)

Speaking of "mergers" generally, this Court's opinion says in the passage just quoted that

> "The role of the Commission in this regard has traditionally been confined to approving or disapproving mergers proposed by the railroads to be merged."

Section 5(2)(b) provides:

> "* * * If the Commission finds that, *subject to* such terms and conditions and *such modifications as it shall find to be just and reasonable,* the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: * * *."

The provisions for modifications of a "merger plan" by the Commission are thus explicit. The power of the Com-

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[37a] See Appendix A.

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mission to provide for modifications of any proposal which is submitted to it, and to take the initiative with respect to unifications at least to that extent, is the same whether there be a transfer of assets, a merger or a consolidation. This Court's decision in *Schwabacher* v. *United States* (1948) 334 U. S. 182 brought about a modification of the plan for a corporate merger of Chesapeake & Ohio Railway Company and Pere Marquette Railway Company and *there are other examples of modifications made by the Commission of transactions covered by applications under § 5(2)(b); one of the most recent examples involved an acquisition by Southern Railway Company of Richmond & Mecklenberg Railroad Company, the terms of which were modified by the Commission.*[38] Yet, in the absence of argument as to the power of the Commission with respect to modifications of the terms of proposed mergers, the Court's opinion says that "the rôle of the Commission in this regard has traditionally been confined to approving or disapproving mergers proposed by the railroads to be merged."

The explicit language of Section 77 as compared with the legislative history recited by the Court.

Footnote 8 to the opinion states that "It would be a gross disregard of the meaning of legislation to be controlled by the bare words of the present merger provision detached from, and in defiance of, the whole history of the section".

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[38] See Appendix A.

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The authority of the Commission to *initiate* and *approve* the Plan which was approved in this case will be found in provisions which are explicit.[39]

There is no question of defiance of the legislative history, because there is nothing in the legislative history which suggests that, in order for the Commission to approve a plan, any affirmative steps have to be taken by a hopelessly insolvent debtor whose assets would be transferred under the plan to another railroad corporation.

We will not repeat here our discussion of the items of legislative history which were cited by counsel for the petitioners and referred to in our brief in No. 24.[40]

However, with the exception of two items, all of the legislative history was assembled by counsel for the petitioners with the idea of establishing that a plan could not be carried out over the objection of a majority in amount of the bondholders, not that it was necessary to have affirmative action by the stockholders (or the debtor). Moreover, this Court's opinion does not distinguish between *propose* and *impose,* or between *initiate* and *force.*

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[39] Section 77(b) provides in part:

> "(b) A plan of reorganization within the meaning of this section * * * (5) shall provide adequate means for the execution of the plan, which may include *the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations* * * *."

Section 77(d) provides for hearings before the Commission, after which

> "* * * *the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed,* that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions."

[40] Pages 104-125.

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This Court has added two additional items of legislative history, one of the year 1939 and the other of the year 1946.

The first will be found in the last three paragraphs of footnote 8 at pages 9-10. We will cover it in a footnote.[41]

The 1946 item of legislative history is sufficiently important to be discussed separately.

The Court's reliance on Senate Report No. 1170 issued in 1946.

The item of legislative history which is accorded the greatest prominence in the Court's opinion is Senate Report No. 1170 of the 79th Congress, 2nd Session, submitted in 1946 by Senator Wheeler for the Senate Committee on Interstate Commerce.[42] The comments in the concurring opinions in *United States* v. *Public Utilities Commission of California* (1953) 345 U. S. 295, 319-321, and *Schwegmann Brothers* v. *Calvert Distillers Corp.* (1951) 341 U. S. 384, 395-397, seem especially applicable to this item:

First: The report related to a bill, S. 1253, which never became law. The following year, 1947, there were two similar bills, S. 249 and H. R. 3980, and neither of them became law.

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[41] This item relates to a proviso in S. 1869 of the 76th Congress, First Session, which was passed by the Senate but not by the House.

The suggestion in the footnote is that the proviso was added "to the merger subsection", but the proviso followed a revised Section 77(b)(4), which was supposed to supersede, and was substantially different from, the present Section 77(b)(5).

The footnote says that the Assistant General Counsel of the R. F. C. "questioned the need for the proviso on the ground that the consistency clause in subsection (f) already covered *the matter*". Thus the Court cites an opinion expressed by a single lawyer in 1939 about the meaning of a statute which was enacted in 1935. Moreover, *the matter* was the subject of "compulsory mergers or consolidations" and the Assistant General Counsel of the R. F. C. did not make the remotest reference to the question whether only a debtor could initiate a plan of reorganization.

[42] See pages 12-15 of the opinion.

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Second: This same Report, No. 1170, was cited to this Court in *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Co.* (1946) 328 U. S. 495 (footnote 14 at page 511) and this Court said (footnotes omitted) at pages 510-512:

> "Although the results of reorganizations under the section, as thus construed, have been criticized as unfortunate and changes have been suggested, no different legislation has been enacted. Indeed a different method for reorganization, enacted in 1939 and designed to meet the requirements of railroads not in need of financial reorganization of the character provided by § 77 but only of an opportunity for voluntary adjustments with their creditors, terminated on July 31, 1940, and a comparable provision made in 1942 was allowed to lapse on November 1, 1945. *This situation leaves clear the duty of the agencies of the Government entrusted with the handling of reorganizations under § 77, including this Court, to administer its provisions according to their best understanding of the purposes of Congress as expressed in the words of § 77 read in the light of the contemporaneous discussion in Congress.*"

Thus the Court refused to consider Report No. 1170 in 1946 because it was not part of the discussion in Congress which took place when § 77 was enacted.

Third: The section of the Report entitled "*Avoidance of consolidation statute*", which this Court has said is "highly relevant here", discussed at great length *Missouri Pacific Railroad Company Reorganization,* 239 I. C. C. 7, 12-15, and also referred to *Denver & Rio Grande Western Railroad Reorganization,* 233 I. C. C. 515; 239 I. C. C. 583, 586-587; 254 I. C. C. 5, 7, 27; 254 I. C. C. 349, 363, 376-379. The discussion was prefaced by the following statement (p. 82):

> "Two cases will be discussed, showing how the procedure for consolidation under cover of re-

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> organization has been used to oust the statute enacted by Congress for consolidation, and how the substitute, noncongressional method has worked."

The consolidations—actually transfers of assets—which were involved related to subsidiaries of the principal debtor, Missouri Pacific Railroad Company.

This Court's opinion does not quote the long references in Report 1170 to the "consolidations" in the *Missouri Pacific* reorganization (p. 80-85); it implies in footnote 12 that "consolidations" of that kind are not barred by the Court's opinion; and yet the opinion uses what Senator Wheeler said about "consolidations" as a support for the holding that the plan in this case calls for an unauthorized "forced merger".

Fourth: This Court's opinion quotes and italicizes at page 15 a paragraph in Report 1170 reading as follows (italics in the Court's opinion):

> *"The most that the Commission may claim under section 77 is that, if it has approved a consolidation by an order under section 5 of the Transportation Act, it may perhaps be able to give effect to that action in the course of reorganization proceedings."*

The implication of this paragraph seems to be that a separate § 5 proceeding must be commenced and an order obtained before a plan providing for a transfer of assets, a merger or a consolidation involving two carriers can be approved in a § 77 proceeding.

But the very "consistency clause", on which the opponents of the Plan rely so heavily, provides[43]

> "Upon confirmation of a plan the Commission shall, without further proceedings grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or

[43] § 77(f).

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> merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes of the Interstate Commerce Act as now or hereafter amended."

This provision that "*upon confirmation of a plan*" "*the Commission shall, without further proceedings, grant authority* * * *" negatives the contention that a separate Section 5 proceeding must be commenced and an order obtained before a plan providing for a transfer of assets, a merger or a consolidation involving two carriers can be approved in a Section 77 proceeding.

Carrying out the evident intent of the Congress to avoid unnecessary duplication and delay, the Commission has properly interpreted the "consistency clause" as providing that (1) Section 5 applications are to be filed *after confirmation* of a § 77 plan and (2) further hearings are not required in connection therewith. To insure compliance with "the consistency clause", the Commission requires that the record in a § 77 proceeding be such as to enable the Commission to make the same findings in that proceeding as would be made in a Section 5 proceeding.[44]

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[44] See footnote 37.
See also 267 I. C. C. 301-302:

> "Section 77 of the Bankruptcy Act provides that a plan of reorganization shall not be inconsistent with the provisions and purposes of the Interstate Commerce Act, but does not specify that the same procedure must be followed. To insure conformity with the provisions of subsection (f) of section 77, the record of a reorganization proceeding involving the question of an acquisition of the properties of a debtor by another carrier or by a noncarrier company which already controls a carrier, (but, on the present record of this case only to the extent as hereinafter shown to be necessary), should be sufficient to enable us, in approving a plan, to make the findings required under the Interstate Commerce Act with respect to such an acquisition."

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Fifth: While the opinion refers to Senator Wheeler as "the guiding spirit of most of the legislation here under consideration", Senator Wheeler virtually disclaimed responsibility for the original § 77 as enacted in 1933[45] and he had little to do with the 1935 revision of the Section.[46] *Furthermore, by 1946 Senator Wheeler was an open foe of § 77* and he unquestionably dominated his Committee when Report 1170 was issued.

The 173-page Report was a step in an unsuccessful campaign, which was waged from early in 1946 until July 1947, to virtually supersede § 77 by a reorganization procedure which would have accorded a dominating position to the stockholders (the debtor).[47]

Appendix C hereto tells some of the story of that campaign, in which Senator Wheeler was a leader until he left the Senate in 1947. The most vigorous supporters of the campaign included the organized stockholders of the Missouri Pacific Railroad Company, particularly the Alleghany Corporation. One of the important features of the plan of reorganization of the Missouri Pacific which the Commission had approved was the provision for a so-called "consolidation" (that is, a unification) of the Gulf Coast Lines and the International-Great Northern Railroad Company with the Missouri Pacific. The Gulf Coast Lines and I.-G. N. were subsidiaries of the Missouri Pacific but they were separately operated.

The section in the Report entitled *"Avoidance of consolidation statute"* has the same congenital defect as the Report in its entirety. It is not judicial in character or

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[45] Report 1170 at pages 1-2.

[46] He was Chairman of the Senate Committee on Interstate Commerce but the principal hearings were held before the House Committee on the Judiciary.

[47] S. 1253, in connection with which Report 1170 was issued, was passed but President Truman vetoed the bill. S. 249 and H. R. 3980, introduced in the following year and of the same tenor, were not passed by either the Senate or the House.

approach. Senator Wheeler, agreeing with the opposition to the Missouri Pacific plan on all grounds, simply embodied in Report 1170 whatever arguments the opponents of the plan had made against the consolidation of the Gulf Coast Lines and the I.-G. N.

* * * * *

The references to and quotations from the Report, which reflects the basic philosophy that reorganizations should be dominated by debtors (that is, the stockholders), together with the discussion of the function of a debtor in a § 77 proceeding in the second paragraph of footnote 12 of the opinion, may go far towards accomplishing the principal objective of the unsuccessful campaign of 1946 and 1947 to have railroad reorganizations dominated by debtors.

The opinion will complicate all plans for railroad unifications, whether in § 77 proceedings or of solvent railroads under Section 5 of the Interstate Commerce Act. Even in the case of the latter it will be necessary for the Commission to decide whether its role should be that prescribed by Congress or that attributed to it as traditional in this Court's opinion.

The use of Report 1170 as support for the Court's decision goes much further, we believe, than this Court has ever gone in resorting to "legislative history".

We repeat that as to Report 1170 and its relation to these matters, the Court heard no argument or suggestions from counsel on either side.

The procedure followed in other cases of unification under Section 77.

The opinion says that if there is to be a "merger" in the course of a § 77 reorganization (p. 11)

> "* * * the merger must be worked out and put before the Commission by the merging carriers.[12] It also means that one carrier cannot be railroaded by the Commission into an undesired merger with another carrier."

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Footnote 12 starts with a sentence saying

> "We are not aware of any case other than the present where this requirement was not observed."

As we are not sure what is meant by the words "worked out", "put before" and "railroaded", we limit our comments to stating what has actually happened in cases of certain unifications under § 77.

Since the second sentence of footnote 12 distinguishes between unifications which involve parents and subsidiaries and those that do not, we will refer to precedents which do not involve carriers already having a parent-subsidiary relationship.

In *Alton Railroad Company Reorganization* (1945) 261 I. C. C. 343, the Commission approved a plan, which was later carried out, for a transfer of the assets of the *Alton* to the *Gulf, Mobile & Ohio.* The debtor proposed a plan for an internal reorganization; a bondholders' committee initiated the plan which involved the G. M. & O. (p. 347). The debtor *later* agreed to the plan (p. 361).

On January 5, 1954 the Commission approved a plan in *Boston & Providence Railroad Corporation Reorganization,* Finance Docket No. 12131, providing for a transfer of the assets of the debtor to the reorganized New York, New Haven & Hartford Railroad Company.[48] The stock of the Boston & Providence concededly has had and has a value; the stockholders presented a plan providing for a lease of the Boston & Providence by the New Haven rather than a transfer of assets; and the debtor, which was controlled by the stockholders, did not sponsor a transfer of the assets.

[48] The Boston & Providence, which owns the line between Providence and Boston, is operated by the New Haven and, so far as the geographical location and railroad operations are concerned, may be regarded as part of the New Haven System. However, it is not a subsidiary of the New Haven and its connection with the New Haven is no closer geographically than that of the Florida East Coast and Atlantic Coast Line.

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So far as we know, there was no contention in either the *Alton* case or the *Boston & Providence* case that the Commission lacked the power to approve the plan which it did approve.

The distinction made by this Court on the ground that a parent and a subsidiary are "a de facto single enterprise".

In Point VI of our brief in No. 24 at pages 83-91 we showed that:

> All of the petitioners' arguments would apply to "mergers" within a railroad system, or to a "merger" of two or more debtors, if they were valid as to a transfer of assets from a debtor to a so-called "outsider".
>
> If the petitioners' construction of Section 77 were sound, it would follow that many plans of reorganization have been illegally approved, confirmed and consummated.
>
> It would also follow that great advantages of Section 77 reorganization procedure would be lost.
>
> With respect to force or compulsion—the consummation of a plan over the objection of the holders of a majority in amount of a class of mortgage bonds—there is no important difference between many intra-system mergers or mergers of debtors, on the one hand, and a transfer of assets from a debtor to a so-called "outsider" on the other.

This was one of the first subjects discussed on the argument as a result of questions put to counsel on the opening argument.

The subject is disposed of in the second sentence of footnote 12:

> "In all the reported cases of reorganizations involving mergers, the merger was either proposed by the debtor in conjunction with the other party, or the

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> merger involved a parent and its subsidiaries, essentially an internal reorganization in that it is merely a recasting of a *de facto* single enterprise."

The Court thus characterizes a "merger" which involves a parent and its subsidiary as "essentially an internal reorganization in that it is merely a recasting of a *de facto* single enterprise".

To give this sentence specific meaning we will consider it in relation to two types of situations which are presented by plans of reorganization that are now pending.

(I) In *New Jersey & New York Railroad Company Reorganization,* Finance Docket No. 13490, which was cited in the respondent's brief in No. 24 at page 57, the Commission approved a plan of reorganization of the New Jersey & New York under which the assets of the debtor would be transferred to Erie Railroad Company. The New Jersey & New York is a subsidiary of the Erie in the sense that the Erie owns all of its stock. However (1) the stock of the New Jersey & New York has been acknowledged for many years to be wholly without value, (2) the property is being administered in the United States District Court for the District of New Jersey and (3) the New Jersey & New York is separately operated.

(II) Another type of parent-subsidiary unification was presented by *Missouri Pacific Railroad Company Reorganization,* to which we have already referred in discussing Senate Report 1170. What does it mean to say that the Missouri Pacific, the Gulf Coast Lines and the International-Great Northern are a "*de facto* single enterprise"?

This Court's opinion says at page 8:

> "The reasons for this hostility to mergers imposed by the Commission derive largely from the disadvantages attributed by Congress to such far-reaching corporate revampings. Employees of the

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> constituent railroads would, it has been feared, almost certainly be adversely affected. Shippers and communities adequately served by railroad A may suddenly find themselves unfavorably dependent upon railroad B. Investors in one railroad would, contrary to their expectations, find their holdings transmuted into securities of a different railroad."

Let us take the Court's four sentences and examine the statement that, if there be a parent-subsidiary relationship, there is already a "*de facto* single enterprise".

First sentence: The Court refers to "far-reaching corporate revampings". The unification proposed in the Missouri Pacific reorganization will be much greater, as respects geography and traffic, than the unification of the Florida East Coast and Atlantic Coast Line.

Second sentence: The employees of a separately operated railroad are always interested in a unification with another railroad. Their interest is precisely the same whether or not the other railroad is a parent. Indeed, the first important decision of this Court under § 5 of the Interstate Commerce Act, relating to the protection of employees, involved a transaction between a parent and a subsidiary. The transaction was not even a transfer of assets, a merger or a consolidation; it was only a lease. *United States* v. *Lowden* (1939) 308 U. S. 225.

Third sentence: Shippers and communities served by a separately operated subsidiary are not ordinarily in a position to make any demands on a parent; the New Jersey & New York, just mentioned, is an example of this. The effects of a unification, so far as shippers and communities are concerned, would ordinarily seem to be the same whether or not there was an existing parent-subsidiary relationship.

Fourth sentence: There is no material difference between calling upon the holder of an International-Great Northern First Mortgage Bond to accept securities

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of the reorganized Missouri Pacific Railroad Company and asking holders of Florida East Coast Bonds to accept securities of the Atlantic Coast Line.

The most important merger of solvent railroads under § 5 on which this Court has passed involved a parent and subsidiary, Chesapeake & Ohio Railway Company and Pere Marquette Railway Company. *Schwabacher* v. *United States* (1948) 334 U. S. 182.

As was pointed out in the respondent's brief in No. 24,[49] Section 5 applies to unifications of parents and subsidiaries.

Section 5(2)(c) provides:

> "In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected."

In view of the expressed policy of the Congress and the realities of carrier relationships, it seems difficult to dismiss unifications of parents and subsidiaries as mere recastings of *de facto* single enterprises. It is also hard to foretell what effect this Court's characterization of such a unification as "merely a recasting of a *de facto* single enterprise" may have on the administration of § 5 and the protection of the various interests which that Section was designed to safeguard.

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[49] Pages 83-84.

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CONCLUSION.

Your petitioner prays that a rehearing be granted and that, upon such rehearing, the order of the Court of Appeals be affirmed.

Dated, April 19, 1954.

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CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for a rehearing is presented in good faith and not for delay.

Dated, April 19, 1954.

EDWARD W. BOURNE
Counsel for Petitioner.

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APPENDIX A.

In the case of a transfer of assets, the transferor does not file an application under § 5(2)(b) of the Interstate Commerce Act.

In our brief dated October 6, 1953, at page 71, we referred in some detail to *Erie Railroad Company Purchase* (1943) 254 I. C. C. 486, in which it was held that, when there was to be a transfer of assets (as distinguished from a merger or consolidation), § 5(2)(b) of the Interstate Commerce Act does not require the vendor to seek the Commission's approval and that any authorization should be granted to the acquiring corporation.

In *Purchaser Railway Corporation Purchase,* Finance Docket No. 15074, decided November 30, 1945 (not reported), a case of a proposed transfer of assets, the Commission granted the application of the purchaser and dismissed the application of the seller for authority to sell the properties on the ground that it was unnecessary.

There are a great many instances where transfers of assets have been authorized under Section 5(2)(b) on the application of the acquiring carrier only; some recent examples are *Wheeling & Lake Erie Railway Company Control* (1943) 254 I. C. C. 632; *Gulf, Mobile & Ohio R. R. Co. Purchase* (1945) 261 I. C. C. 405; *Gulf, Mobile & Ohio R. R. Co. Purchase* (1946) 261 I. C. C. 623; *Cambria & Indiana R. R. Co. Control* (1950) 275 I. C. C. 360; *Southern Railway Co. Purchase* (1950) 275 I. C. C. 724.

Gulf, Mobile & Ohio R. R. Company Purchase (1945) 261 I. C. C. 405 involved a § 5(2)(b) application which was filed in carrying out the plan of reorganization of Alton Railroad Company. The plan itself was approved in *Alton Railroad Company Reorganization* (1945) 261 I. C. C. 343, a proceeding under § 77. The only § 5(2)(b) application was filed by Gulf, Mobile & Ohio Railroad Company,

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which was acquiring the Alton's assets under the plan. In other words, as we have said in the text of the petition for a rehearing, the procedure followed was precisely the same as that which counsel and the Commission thought to be correct in this case.

Since counsel for Southern Railway Company played a a large part in developing the "forced merger" argument and had the lead in presenting it in the Courts from the time of the argument before Judge SIBLEY in 1949 until the spring of 1953, it is interesting to note that in *Southern Railway Company Purchase,* just cited, which was decided in 1950 after the argument before Judge SIBLEY, counsel for Southern Railway Company recognized that it was unnecessary, in the case of a transfer of assets, to have the transferor file an application under § 5(2)(b). *Southern Railway Company Purchase* involved the acquisition by Southern Railway Company of the assets of Richmond & Mecklenburg Railroad Company.

The Commission exercises its power to modify the terms of transactions subject to § 5(2)(b) whenever the occasion calls for it to do so.

The Commission's statutory rôle under § 5(2)(b) is not limited to approving or disapproving transactions as proposed. Whenever the occasion calls for it to do so, it exercises its power under § 5(2)(b) to make *"such modifications as it shall find to be just and reasonable".*

As we have said in the body of the petition, this Court's decision in *Schwabacher* v. *United States* (1948) 334 U. S. 182 brought about a modification of the plan for a corporate merger of Chesapeake & Ohio Railway Company and Pere Marquette Railway Company. In *Pere Marquette Railway Company Merger* (1947) 267 I. C. C. 207 the Commission approved the merger plan on the basis that the

dissenting stockholders would be free to undertake to enforce claims for cash under Michigan law. This Court disapproved the Commission's order because it had failed to dispose of the claims of dissenting stockholders. On the remand to the Commission in *Pere Marquette Railway Company Merger* (1949) 271 I. C. C. 667, the Commission ruled that the dissenting stockholders should receive only the same treatment as the assenting stockholders and approved the merger on "the terms and conditions proposed, modified to eliminate the provision for cash alternatives to conform with the ruling of the Supreme Court" (p. 674).

In *Southern Railway Company Purchase* (1950) 275 I. C. C. 724, already cited, which had to do with the acquisition by Southern Railway Company of the assets of Richmond & Mecklenburg Railroad Company, the Commission modified the terms of the transaction.

The Commission also exercised its power of modification in *Wheeling and Lake Erie Railway Company Lease* (1949) 261 I. C. C. 713, which involved a 99-year lease of the Wheeling and Lake Erie by the Nickel Plate and the acquisition of control through stock ownership of two smaller railroads. Pennroad Corporation, a minority stockholder of the Wheeling and Lake Erie, intervened and asked the Commission to modify the proposed lease in nine respects; two modifications were made (p. 735-739). Of course, there is no difference under § 5(2)(b), either technically or as a matter of substance, between the making of a 99-year lease and a transfer of fee ownership.

Other examples of modifications of the terms of transactions under § 5(2)(b) could be given.

APPENDIX B.

The Wall Street Journal of Wednesday, April 7, 1954 carried the following article (p. 8, col. 2):

MoPac Chairman Says Ban on Forced Mergers Applies to Road's Case

He Asserts Supreme Court Ruling On Florida Lines Hits Present Reorganization Plan

By a WALL STREET JOURNAL *Staff Reporter*

NEW YORK—T. C. Davis, chairman of the bankrupt Missouri Pacific Railroad Co., declared the Supreme Court's decision turning down the Florida East Coast Railway reorganization plan would also apply to the Interstate Commerce Commission's plans for MoPac reorganization.

On Monday the High Court ruled 4 to 3 against the I.C.C.'s plan for merging the Florida East Coast with Atlantic Coast Line Railroad. The decision held that the I.C.C. does not have power under Section 77 of the Bankruptcy Act to "force" a merger and that a merger must be worked out and put before the Commission by merging carriers.

All plans heretofore approved by the I.C.C. as well as the plan presently proposed by the examiners," said Mr. Davis, "provide for 'forced' or 'compulsory merger' of the Missouri Pacific, the New Orleans, Texas & Mexico Railway and the International-Great Northern Railroad." These merger proposals, he stated, have "always been unfair to Missouri Pacific security holders as the debtor (Missouri Pacific Railroad Co.) has shown."

I.C.C. plans have provided for reorganization of the MoPac on a system basis, including the N.O.T.&M. and I.-G.N. The properties have been operated under trusteeship since 1933.

Mr. Davis said the court's opinion makes it clear that the debtor has the "whip hand," not the trustees, in working out a merger. The

> Missouri Pacific company, he said, had put no such proposal before the commission.
>
> The debtor company advocating a Mo Pac reorganization under the more liberal provisions of the Mahaffie Act—Section 20b of the Interstate Commerce Act.
>
> "Another time-consuming road block has been placed in the path of a Section 77 reorganization" for Mo Pac, Mr. Davis said, adding that the Supreme Court decision "underscores the debtor's view that only a Section 20b reorganization can be accomplished in less than five years."

NOTE: The underlining has been added.

The N. O. T. & M. referred to in Mr. Davis' statement is the parent company of the Gulf Coast Lines, referred to in Senate Report 1170.

Guy Thompson, Trustee of the Missouri Pacific Railroad Company, indicated that he does not agree with Mr. Davis that this Court's decision in this case of April 5, 1954 constitutes "another time-consuming road block * * * in the path of a Section 77 reorganization". On April 8, 1954 the Wall Street Journal reported a statement by Thompson, in which he was quoted as saying (p. 8, col. 5):

> "The Supreme Court's opinion 'clearly and emphatically distinguished' a case such as the Florida East Coast 'from a situation such as is presented in the Missouri Pacific case, in which the plan for merger of the Missouri Pacific and its subsidiaries has been initiated and proposed by them,' Mr. Thompson said. The opinion refers to such a merger as 'essentially an internal reorganization in that it is merely a recasting of a de facto single enterprise,' he added."

When Mr. Thompson said that in the Missouri Pacific reorganization the "plan for merger of the Missouri Pacific and its subsidiaries has been initiated and proposed by them" he was probably referring to the fact that in 1936 the Missouri Pacific and its subsidiaries jointly presented a plan for a unification. However, that plan died and the

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debtor, Missouri Pacific Railroad Company, has opposed all plans which the Commission has approved. Furthermore, as appears from Chairman Davis's statement, the debtor Missouri Pacific is opposing all current proposals for the reorganization of the Missouri Pacific under § 77 and is striving to put the reorganization under Section 20(b) of the Interstate Commerce Act, where the debtor would have a dominating position.

When Mr. Thompson said that this Court "clearly and emphatically distinguished" the *Missouri Pacific* case, he quoted *the second sentence of footnote 12* of this Court's opinion. Perhaps he was not aware of the fact that Senate Report 1170, from which this Court's opinion quotes so extensively, attacked a "merger" of the Missouri Pacific and its subsidiaries, since this Court's opinion did not quote that attack.

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APPENDIX C.

A readable story of the attempt to supersede § 77 in 1946 and 1947 will be found in Hayes, IRON ROAD TO EMPIRE, Simmons-Boardman (1953), Library of Congress Catalog Card Number: 53-12175, a history of the Rock Island Lines.

At pages 262-263:

> "Wheeler late in 1945 dumped a bill into the hopper designated as S. 1253. The purpose of the legislation was to nullify pending plans of reorganization of bankrupt railroads, as developed by the Commission, return these properties to the stockholders, put the functions of management back in the hands of the debtor corporations, and allow the stockholders under court supervision to work out their own reorganization with the various creditor groups.
>
> War earnings on most railroads now in the hands of the Federal courts, Wheeler reasoned, had proved sufficient to give the stock issues, declared without equity by the Commission, full reinstatement.
>
> Wheeler, chairman in the 79th Congress of the Senate Interstate Commerce Committee, scheduled hearings on the bill in the spring of 1946. The hue and cry went around Capitol Hill that everything must be done for the widows and orphans.
>
> During the hearings it developed that the main widow and orphan in the picture were Robert R. Young and his Alleghany Corporation. Young, who in 1932 had outsmarted the Morgan banking firm and the Guaranty Trust Company, of New York, to gain control of Alleghany, had gathered in with the other cats and dogs in the package the majority of the Missouri Pacific's common stock. Since Young had picked up Alleghany with an investment of only slightly more than $3,500,000 it was pretty certain that the apportionment of this outlay to Missouri Pacific common represented no more than a few cents a share.

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Young appeared personally to testify and so did Alleghany's general counsel. Witnesses were gathered up from all over the country, most of them pleading for widows and orphans who didn't exist."

After describing various developments, mostly having to do with the Rock Island's Court proceedings, the author says (p. 265):

"The House, in Washington, passed a conference compromise of the Wheeler Bill in July and it went to the President for signature. The legislation came in the last minute rush to close up the 79th Congress so that its members could get back to the bushes for campaigning.

When President Truman got around to consideration of Burt Wheeler's railroad reorganization bill, early in August, 1946, John Snyder, his Secretary of the Treasury, advised him against signing on the grounds that the impact of such a law on railroad credit would be extremely serious. The Interstate Commerce Commission also advised in favor of a veto.

But the death knell was sounded by Representative Francis Walter, Democrat of Pennsylvania, who had been bitterly opposed to such legislation. Walter called the President by telephone, called the bill scandalous, and purportedly told Truman that if it were made into law by his signature it might very well cause on investigation of Democratic congressmen—and the party, at this time, with a new congress to be elected in the fall, certainly couldn't stand another national scandal.

Truman vetoed the bill. The President said he wasn't opposed to the basic principle of the legislation but, in its present form, he didn't like the 'limitations and discriminations' it contained. He made it clear that he did not necessarily favor any of the reorganization plans of the various bankrupt railroads as projected by the Commission. He told the bill's proponents that he hoped they would work out a better bill in the next session."

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Things remained fairly quiet until early the following year (p. 270):

> "The decisive defeat of Burt Wheeler in the Montana elections where the voters replaced him in the Senate with Zales Ecton, Republican, brought no solace to the opponents of reorganization legislation. Wheeler promptly moved into Washington, opened a law firm with his son, Eddie, and took over representation of the Robert R. Young interests."

The most important developments came when H. R. 3980 was introduced (p. 272):

> "Meanwhile, Chauncey Reed, in the House in Washington, brought in his reorganization bill, designated as HR 3237 but later reintroduced as HR 3980. He immediately announced that hearings before the House Judiciary Committee would begin on May 12, and thereby caught the railroad interests opposed to the legislation something more than flat-footed.
>
> Reed contended that the committee should be guided by the voluminous amount of testimony taken the previous year on the Wheeler Bill, and gave every indication that he intended to move fast with his measure. He admitted that he expected considerable opposition and was prepared to meet it.
>
> What Representative Reed hadn't figured on was the terrific opposition leadership that was to come from Senator Albert Hawkes, of New Jersey, from Representative Francis A. Walter, Pennsylvania, a member of Reed's committee, and from Representative Ross Rizley, Oklahoma, on the House Rules Committee."

The House and Senate Committees each reported a bill favorably by a margin of one vote, but the bills never came to the floor and were never revived (p. 276-278).

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